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C O U R T   O F   A P P E A L S

SHELLEY ADELMAN, SHARON KLEIN, JONATHAN WARES, ANKUR SAGGAR, SHIVA Y. STEIN, JOHN URBONAS, and JEFFREY BUSHMAN, Plaintiffs-Appellees, and DAVID ESSIG and CITY OF SUNRISE POLICE DEPARTMENT, Intervening Plaintiffs-Appellants,	UNPUBLISHED December 14, 2017
v COMPUWARE CORPORATION, GURMINDER S. BEDI, ROBERT C. PAUL, JEFFREY J. CLARKE, JOHN G. FREELAND, DAVID G. FUBINI, WILLIAM O. GRABE, FREDERICK A. HENDERSON, FAYE ALEXANDER NELSON, JENNIFER J. RAAB, LEE D. ROBERTS, STEPHEN F. SCHUCKENBROCK, THOMA BRAVO, LLC, PROJECT COPPER HOLDINGS, LLC, PROJECT COPPER MERGER CORP, ELLIOTT MANAGEMENT CORPORATION, ELLIOTT CAPITAL ADVISORS, LP, ELLIOTT INTERNATIONAL CAPITAL ADVISORS, INC., ELLIOTT INTERNATIONAL, LP, ELLIOTT SPECIAL GP, LLC, HAMBLEDON, INC., and PAUL E. SINGER, Defendants-Appellees.	No. 333209 Wayne Circuit Court LC No. 14-011437-CB

Before: GLEICHER, P.J., and GADOLA and O'BRIEN, JJ.

PER CURIAM.

The current dispute relates to the acquisition of Compuware Corporation by Thoma Bravo. The intervening plaintiffs are shareholders who objected ("Objectors") to a proposed settlement agreement in a class action suit brought by a representative group of shareholders (plaintiffs). Essentially, the Objectors believed that a group owning 8% of Compuware's shares (the Elliott defendants) engaged in underhanded tactics to force the Compuware Board of Directors into the sale, that the board received secret benefits from selling Compuware below its share value, and that the release of damages claims in the settlement agreement lacked consideration. The circuit court ultimately approved and entered the settlement agreement, dismissing the Objectors' challenges. We affirm.

I. STANDARD OF APPROVAL FOR SETTLEMENT

A trial court may approve a class action settlement if the settlement is fair, reasonable, and adequate. See Vassalle v Midland Funding, LLC, 708 F3d 747, 754 (CA 6, 2013).[1] The Objectors contend that the trial court erred in two interwoven aspects when it approved this settlement. Initially, the Objectors claim, the court improperly presumed the settlement was fair, reasonable, and adequate. It compounded that error, the Objectors insist, by shifting to them the burden to prove that the settlement did *not* meet the requisite criteria, thereby relieving plaintiffs of their burden. The Objectors assert that the court should not have approved the settlement agreement given plaintiffs' meager investigation into the allegations of wrongdoing by the Elliott defendants to influence the board members to accept the settlement.

We review for an abuse of discretion a trial court's approval of a class action settlement agreement. *Whitlock v FSL Mgmt, LLC*, 843 F3d 1084, 1093 (CA 6, 2016). "In the absence of clear Michigan law on matters of corporate law, Michigan courts often refer to Delaware law." *Glancy v Taubman Ctrs, Inc*, 373 F3d 656, 674 n 16 (CA 6, 2004). Given the paucity of Michigan caselaw regarding class actions, we follow the lead of the litigants and the trial court and rely on caselaw from Delaware and federal courts.

The approval of class action settlement agreements involves "a two-step process." *Crowhorn v Nationwide Mut Ins Co*, 836 A2d 558, 562 (Del Supr, 2003).

> First, the court makes a preliminary evaluation of the fairness of the settlement after reviewing the proposed terms. If the Court concludes that there are no grounds to doubt the fairness of the settlement, the Court must order that class members be given notice of a formal Fairness Hearing, at which time class members will have an opportunity to make presentations in support of or in opposition to the proposed settlement. Following the Fairness Hearing, the Court makes specific findings regarding the fairness, adequacy and reasonableness of the settlement. Only if the Court finds that the settlement meets these requirements will the Court render final approval of the settlement. [*Id.*]

[1] We accept as "persuasive authority" the decisions of lower federal courts and our sister states cited in this opinion. *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 268; 671 NW2d 125 (2003).

In this instance, the trial court gave preliminary approval to the settlement agreement on July 23, 2015, and a final approval hearing was scheduled and conducted on March 24, 2016.

As discussed in *Whitlock*, 843 F3d at 1093:

> [FR Civ P] 23(e) . . . requires that class-action claims "may be settled, voluntarily dismissed, or compromised *only with the court's approval*." FR Civ P 23(e) (emphasis added). Approval is only warranted where the court determines, *inter alia*, that the proposed class settlement would be "fair, reasonable, and adequate." *Id*. Factors that guide this inquiry include:
>
>> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest. *UAW v GMC*, 497 F3d 615, 631 (CA 6, 2007).

"[T]here is a presumption in favor of the settlement when there has been arm's length bargaining among the parties, sufficient discovery has taken place to enable class counsel to evaluate accurately the strengths and weaknesses of the plaintiff's case, only a few members of the class object and their relative interest is small." *Crowhorn*, 836 A2d at 563. Even if the terms of a settlement agreement are not construed to be "ideal," approval should not be withheld if they are "fair and reasonable." *Jane Doe 30's Mother v Bradley*, 64 A3d 379, 400 (Del Supr, 2012).

The review procedure to be undertaken by the trial court in the approval of a settlement agreement "requires the court to decide whether, in the exercise of its own business judgment and in light of the facts and circumstances presented, the proposed settlement is a fair and reasonable resolution to this litigation." *In re TD Banknorth*, 938 A2d 654, 657 (Del Ch, 2007). "Th[e] legal standard for approval of a class action settlement is well-established . . . and embodies the notion that courts . . . generally favor the voluntary resolution of legal disputes." *Id.* at 657 n 4 (citation omitted). Specifically, "an evaluation of whether a settlement is fair and reasonable requires balancing the strengths of the claims being compromised against the benefits the settlement provides to the class members. The settlement's proponents bear the burden of persuasion by a preponderance of the evidence." *Id.* (citations omitted). Ultimately, a "court fulfills its duty under [FR Civ P] 23 by exercising its sound business judgment in weighing and considering 'the nature of the claim, the possible defenses to it, [and] the legal and factual obstacles facing the plaintiff in the event of trial.' " *Marie Raymond Revocable Trust v MAT Five LLC*, 980 A2d 388, 402 (Del Ch, 2008), aff'd sub nom *Whitson v Marie Raymond Revocable Trust*, 976 A2d 172 (Del Supr, 2009) (citation omitted).

In approving the settlement agreement, the trial court analyzed in detail the factors used to determine whether a settlement was "fair, reasonable, and adequate." The Objectors urged that the settlement was unfair, contending that the Elliott defendants coerced or threatened members of the company's board of directors into voting for the settlement agreement. The trial court attempted to elicit evidence from the Objectors to support their implication of collusion or fraud by Elliott to no avail. The court noted that, although the Objectors alleged that Elliott threatened two board members with "dossiers" to secure their cooperation, the Objectors never brought forward any evidence regarding the content of the alleged "dossiers" or disputing deposition testimony that the Elliot defendants' actions did not influence the board members' settlement positions. Notably, supplemental disclosures confirmed that all of the shareholders were treated equally in the settlement, that Elliott did not receive any preferential or different treatment, that none of the directors obtained a special benefit from the agreement, and that none of the individuals or entities involved in the settlement negotiations had ties to Thoma Bravo, the only bidder for the company.

Further, in the absence of demonstrable fraud or the violation of the board's fiduciary duties, the board "enjoys the protection of the business judgment rule in discharging its responsibilities." *Polk v Good*, 507 A2d 531, 536 (Del Supr, 1986). "The [business judgment] rule creates a presumption 'that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the corporation.' " *Id.* (citation omitted). As noted by the trial court, and argued by plaintiffs and defendants in support of the settlement agreement, Goldman Sachs evaluated and provided financial advice regarding the Thoma Bravo offer, concluding that the share purchase price was within the upper range of the share values.

The trial court also discussed the complexity, expense and likely duration of the litigation should it reject the settlement, which included an analysis of the public interest aspect of the alternatives. The court noted that class counsel and class representatives favored the settlement and that the interests of the opposing class members were protected by their right to opt out. The Objectors simply failed to exercise that right.

The Objectors' two major concerns with the settlement focused on the amount of discovery undertaken and the likelihood of their success on the merits. The Objectors contended that class counsel failed to engage in sufficient discovery, primarily arguing that the failure to depose Peter Karmanos was critical given information obtained from an arbitration involving Karmanos. The Objectors also relied on the Karmanos family members' "opt-out" of the settlement to bolster their position regarding the likelihood of their own success on the merits.

Addressing the adequacy of the discovery conducted, the trial court observed that class counsel had deposed witnesses, secured an expert review by Goldman Sachs, and secured over 40,000 pages of additional nonpublic documents in assessing the settlement agreement and addressing the Objectors' concerns. The court rejected the Objectors' contention that the failure to depose Karmanos overrode or minimized the discovery actually undertaken. In relation to the Objectors' potential for success, the court determined that plaintiffs had demonstrated the adequacy and fairness of the proposed settlement. In particular, the court referenced the business judgment rule, plaintiffs' receipt of financial advice from Goldman Sachs, the absence of any evidence of disparate treatment among the shareholders or any side deals for the directors, in conjunction with the public nature of the sale and the absence of any viable bidders other than Thoma Bravo. As such, the trial court concluded that the Objectors did not have a reasonable likelihood of success on their breach of fiduciary duty and damages claims.

Contrary to the argument of the Objectors, the court did not shift the burden of proof with regard to approval of the settlement. As noted, the proponent of a settlement has the burden of showing its fairness. In reviewing the factors relevant to a fairness determination—reasonableness and adequacy of the settlement—the trial court focused on the proofs and evidence submitted by plaintiffs. The court's recognition and discussion of the concerns expressed by the Objectors did not shift the burden. Rather, the Objectors' allegations and concerns forced the court to more deeply consider the sufficiency of plaintiffs' proofs. The trial court's effort to secure greater detail or evidence regarding the allegations set forth by the Objectors was intended to evaluate whether plaintiffs had fulfilled their burden to demonstrate the adequacy of the settlement and benefit to the shareholders. The Objectors' allegations were speculative in nature and neither contradicted nor outweighed the proofs provided by plaintiffs.

The Objectors also fail to recognize certain legal precepts in their claim of error. Preliminary approval of a class action settlement renders that settlement presumptively reasonable. The objecting class members must then meet the "heavy burden" of proving otherwise. See *Williams v Vukovich*, 720 F2d 909, 921 (CA 6, 1983). The trial court granted preliminary approval of the proposed settlement and undertook a separate assessment for final approval, specifically considering the Objectors' expressed concerns. The court explicitly ruled "that Plaintiffs have met the burden of showing that the disclosures were material and that the disclosure-only settlement with releases was fair and reasonable." As such, the Objectors' claim that the court improperly shifted the burden is not supported by the record.

II. DISCLOSURE-ONLY SETTLEMENT

The Objectors also challenge the propriety of approving the disclosure-only settlement agreement. The Objectors contend that the disclosures obtained by plaintiffs were not material and provided no substantive value in exchange for the releases obtained.

A disclosure-only or disclosure settlement is "the most common method for quickly resolving stockholder lawsuits that are filed routinely in response to the announcement of virtually every transaction involving the acquisition of a public corporation." *In re Trulia Inc Stockholder Litigation*, 129 A3d 884, 887 (Del Ch, 2016.) A "disclosure settlement . . . refer[s] to settlements in which the sole or predominant consideration provided to stockholders in exchange for releasing their claims is the dissemination of one or more disclosures to supplement the proxy materials distributed for the purpose of soliciting stockholder approval of a proposed transaction." *Id*. at 891 n 15.

When "deciding whether to approve a class settlement, a court must consider whether the agreement benefits class members." *In re Walgreen Co Stockholder Litigation*, 832 F3d 718, 723 (CA 7, 2016). With respect to disclosure-only settlements, this depends on the adequacy of the disclosures. "Whether disclosures are adequate is a mixed question of law and fact." *Zirn v VLI Corp*, 621 A2d 773, 777 (Del Supr, 1993). As explained in *TSC Indus, Inc v Northway, Inc*, 426 US 438, 450; 96 S Ct 2126; 48 L Ed 2d 757 (1976) (footnotes and citations omitted):

> [W]e must bear in mind that the underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination of materiality. The determination requires delicate assessments of the inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones

> for the trier of fact. Only if the established omissions are "so obviously important to an investor, that reasonable minds cannot differ on the question of materiality" is the ultimate issue of materiality appropriately resolved "as a matter of law[.]"

We review de novo questions of law, *United States Fidelity & Guarantee Co v Citizens Ins Co*, 241 Mich App 83, 85; 613 NW2d 740 (2000), and issues of fact for clear error, *Teran v Rittley*, 313 Mich App 197, 213; 882 NW2d 181 (2015). A trial court commits clear error "where there is no evidentiary support for [the court's factual findings] or where there is supporting evidence but [we are] nevertheless left with a definite and firm conviction that the trial court made a mistake." *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007) (citations omitted).

As stated in *In re Walgreen Co*, 832 F3d at 723-724:

> Disclosures are meaningful only if they can be expected to affect the votes of a nontrivial fraction of the shareholders, implying that shareholders found the disclosures informative. As explained by the Supreme Court in *TSC Indus, Inc* [], 426 US [at] 449[], "an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote . . . . What th[is] standard . . . contemplate[s] is a showing of a substantial likelihood that, under all the circumstances, *the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder*." *Id.* (emphasis added).

As part of the impetus for the settlement agreement, Compuware made supplemental disclosures, which were included in the amended proxy statement. The disclosures encompassed the following:

> 1. An acknowledgement that none of the company's shareholders, which would include Elliott, "is part of the purchasing group and all shareholders are being treated the same in the merger and are receiving the merger consideration for their shares."
>
> 2. Information pertaining to the financing for the merger, including monies realized by the company from the sale of its physical headquarters.
>
> 3. Clarification of the accounting performed by Goldman Sachs regarding the company's ready cash, indicating the availability of approximately $232 million in cash in the preparation of an "illustrative discounted cash flow analysis."
>
> 4. The provision of updates and forecasts of future performance by the company reflecting the decreased growth rate of DynaTrace, which was contrary to earlier projections and leading to alterations in anticipated growth forecasts for the company.
>
> 5. Additional financial projections for the company, including adjusted EBITDA [earnings before interest, taxes, depreciation and amortization] figures and predictions regarding the company's "unlevered free cash flow" into 2019.

We note at the outset that the Objectors filed a proposed amended complaint prior to Compuware's supplemental disclosures. Through several allegations in that complaint, the Objectors implicitly recognized the materiality of the content of certain of these disclosures. Whether the Elliott defendants were partnered with Thoma Bravo was a key issue in this case, according to the Objectors' own proposed complaint. The Objectors accused Elliott of partnering with Thoma Bravo in the past as well as in the current matter to influence the sale, as part of the purchasing group. The Objectors further asserted that the initial proxy statement "omit[ted] material information concerning Elliott's impact and involvement in the Buyout," expressly admitting that additional information was necessary and would be material to the voting decision. It therefore was material and relevant for Compuware to disclose that Elliott was not partnered with Thoma Bravo in the current transaction.

Similarly, the Objectors accused Elliott of providing hidden compensation to two Compuware directors that it had nominated. And the Objectors asserted that the original proxy did "not disclos[e] whether Elliott provided any compensation" to those board members. The Objectors described this information as "critical" to the shareholders' evaluation of the voting issue. It was therefore material that Compuware disclosed that none of its board members were given preferential treatment as part of the deal, and it is disingenuous for the Objectors to now claim that the first supplemental disclosure is not material.

Moreover, the Objectors asserted that the Compuware share value was reduced from $11.75 to $10.50 because of actions by Elliott. It follows that it was highly material that the share price was reevaluated after Goldman Sachs corrected errors in its earlier financial analysis. The Objectors also contended that Elliott played a role in convincing Thoma Bravo to separate the APM business into Dynatrace and artificially reduce Compuware's share price. The Objectors thereby admitted that information regarding the valuation of Dynatrace, provided in the fourth supplemental disclosure, was material.

And although the litigants' experts, Travis Keath and Sean Griffith, disagreed regarding the meaningfulness or materiality of the disclosures, plaintiffs presented sufficient evidence to meet their burden.

On behalf of plaintiffs, Keath opined that the discounted cash flow (DCF) analysis was integral to valuation of the company, stating:

> [T]he importance of DCF analysis makes [the company's] projected unlevered free cash flows the single-most meaningful addition to the existing disclosure. DCF analysis cannot be performed without projected cash flows. . . . [T]he inclusion of [the company's] projected unlevered free cash flows by itself was uniquely important, enabling shareholders to estimate the value of [the company] using the most important valuation method – the DCF analysis.

In advocating for the materiality and significance of the supplemental disclosures, Keath further noted:

> The Original Proxy failed to inform shareholders that [the company] had real property for sale and that its conversion to cash was imminent. Nor could such

> have been surmised by context. The 163 million assumed by Goldman [Sachs] was referred to as "after-tax value" rather than "proceeds" (the latter term indicating a sale, whereas the former carries no such connotation).

Keath indicated that the correction of an error in the reporting of the company's "net debt" was also significant "to ascertain the value of the equity [the company's] shareholders are being asked to sell as part of the Transaction," in addition to the overall value of the enterprise. Keath disputed that the supplemental disclosures could have been discerned upon close inspection or reading of the original proxy statement. Rather, according to Keath, "[t]he revisions are succinctly worded . . . and isolated in the Proxy Amendment. The substance of the new disclosures can be readily discerned in a few minutes. . . ."

Relying on their expert, Griffith, the Objectors challenged the expansive release of claims within the settlement agreement in exchange for the supplemental disclosures, construing the exchange to be based on "insubstantial consideration." Griffith characterized information disclosed pertaining to the sale of the company's headquarters as "particularly unhelpful" because it did not alter the amount of "freely available cash" previously reported. Griffith further asserted that the sale of the company's headquarters had been publicly announced before the supplemental disclosures and was required by Securities and Exchange Commission rules and therefore "added nothing at all." The alleged "breakdown" of one of the valuations or variables used by Goldman Sachs in the discounted cash analysis was characterized by Griffith as meaningless and immaterial because it simply comprised the "repetition of prior disclosures." Griffith asserted that the revised projections were also irrelevant because it was simply a repetition of information contained in the original proxy statement.

Griffith contended that the disclosure of the adjusted EBITDA figures created an ambiguity and did not provide relevant information to the shareholders. He further disputed that the projection of the company's unlevered cash flow was necessarily material. According to Griffith, even if the unlevered cash flow information was helpful or buttressed the valuation of the financial advisor, this was insufficient to render the disclosure material. Griffith opined the settlement should be rejected because "the supplemental disclosures neither individually nor collectively alter the total mix of information available to a reasonable investor. Because they fail to meet the standard of materiality, they provide no legally cognizable benefit to the shareholder class and therefore cannot serve as the basis for the Release."

The Objectors also rely on recent caselaw criticizing disclosure-only settlements. Specifically, criticisms pertaining to disclosure-only settlements were discussed in *In re Trulia*, 129 A3d at 896:

> Given the rapid proliferation and current ubiquity of deal litigation, the mounting evidence that supplemental disclosures rarely yield genuine benefits for stockholders, the risk of stockholders losing potentially valuable claims that have not been investigated with rigor, and the challenges of assessing disclosure claims in a non-adversarial settlement process, the Court's historical predisposition toward approving disclosure settlements needs to be reexamined. In the Court's opinion, the optimal means by which disclosure claims in deal litigation should be adjudicated is outside the context of a proposed settlement so that the Court's

> consideration of the merits of the disclosure claims can occur in an adversarial process where the defendants' desire to obtain a release does not hang in the balance.

In ascertaining the value of the disclosures obtained, it is generally recognized that a fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *In re Rural/Metro Corp Stockholders Litigation*, 88 A3d 54, 104 (Del Ch, 2014) (citation omitted). Contrary to the Objectors' position, "[t]he inquiry does not require 'a substantial likelihood that [the] disclosure . . . would have caused the reasonable investor to change his vote.' " *Id.* (citation omitted). "The question is rather whether there is 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.' " *Id.* (citation omitted). In accordance with the standard established under *Trulia*: (a) supplemental disclosures are required to address "a plainly material misrepresentation or omission," (b) the subject matter of the proposed release is to be narrowly drafted to include nothing more than the disclosure claims and fiduciary duty claims pertaining to the sale process, and (c) the record should demonstrate that such claims have been adequately investigated. *In re Trulia*, 129 A3d at 898.

Disclosures may be deemed immaterial because they only provide "extraneous details [that] do not contribute to a fair summary and do not add value for stockholders." *Id.* at 900-901. For example, when the company's board relied on the advice of a financial advisor, here Goldman Sachs, the "stockholders are entitled to receive in the proxy statement a fair summary of the substantive work performed by the investment bankers [] whose advice . . . as to how to vote on a merger or tender [they] rely." *Id.* at 900 (quotation marks omitted). A "fair summary" is defined as a "summary" that "need not contain all information underlying the financial advisor's opinion or contained in its report to the board." *Id.* "The essence of a fair summary is not a cornucopia of financial data, but rather an accurate description of the advisor's methodology and key assumptions." *Id.* at 901.

The trial court did not err in finding that the supplemental disclosures could be construed as material. The revised financial projections regarding the company's anticipated future performance and the actual decreasing growth rate of certain of its subsidiaries in determining the valuation of the company supplied valuable information of precisely the sort that the Objectors claimed necessary. Thus, changes in the projected financial performance of the company are material to correct prior assumptions affecting valuation. Specifically:

> Additional disclosure may be required if "the omission of a related fact renders the partially disclosed information materially misleading." "When a document ventures into certain subjects, it must do so in a manner that is materially complete and unbiased by the omission of material facts." Even if the additional information independently would fall short of the traditional materiality standard, it must be disclosed if necessary to prevent other disclosed information from being misleading. [*Chen v Howard-Anderson*, 87 A3d 648, 689 (Del Ch, 2014) (citations omitted).]

In addition, the supplemental disclosures corrected assumptions by Goldman Sachs regarding the company's available cash or cash flow pertaining to the sale of the physical headquarters, which had inaccurately been reported as a debt rather than an asset.

Additionally, the trial court noted an important distinction between this case and the situation identified in *Trulia*. *Trulia*'s cited disfavor for disclosure-only settlement agreements is based on Delaware law, which does not afford shareholders or class members the opportunity to "opt out" of an action, thereby requiring closer scrutiny to protect their respective interests. *In re Resorts Int'l Shareholders Litigation Appeals,* 570 A2d 259, 264 (Del Supr, 1990) ("Delaware suits for hearing and settlement as class and derivative actions are not subject to opt-out . . . ."). In contrast, MCR 3.501(A)(3) affords "[c]lass members . . . the right to be excluded from an action[.]" The ability of a litigant in Michigan to opt out of a settlement affords protection against having an unfavorable settlement imposed on a member of a particular class and minimizes the need for the concern expressed by Delaware courts with regard to disclosure-only settlement agreements.

With regard to the scope of the release provided in exchange for the supplemental disclosures, the release provides, in relevant part:

> 4.3 The Settlement is intended to extinguish all Settled Claims, including Unknown Claims and, consistent with such intentions, Plaintiffs, the Class Members and the Released Persons waive, to the fullest extent permitted by law, the provisions, rights, and benefits of any state law, federal law, foreign law or principle(s) of common law which may have the effect of limiting the releases[.]

Earlier in the settlement agreement, plaintiffs "(on behalf of themselves and the Class) and Defendants," agreed that subject to the trial court's approval, "the Consolidated Action shall be dismissed with prejudice[.]" "Released Claims" were defined as

> collectively [comprising] any claims, demands, rights, actions, causes of action, liabilities, damages, losses, obligations, judgments, duties, suits, costs, expenses, matters, and issues known or unknown, contingent or absolute, suspected or unsuspected, disclosed or undisclosed, liquidated or unliquidated, matured or unmatured, accrued or unaccrued, apparent or unapparent, including Unknown Claims that have been or could have been asserted . . . by or on behalf of Plaintiffs, any of the Class Members, or Compuware . . . arising out of . . . the allegations to the Consolidated Action, the Complaint, the Merger Agreement, or disclosures made in connection therewith. . . .

Actions to enforce the settlement were not "contemplated by this Stipulation."

In these matters, "the limiting principle is that a settlement can release claims that were not specifically asserted in the settled action, but only if those claims are based on the same identical factual predicate or the same set of operative facts as the underlying action." *In re Philadelphia Stock Exch, Inc*, 945 A2d 1123, 1146 (Del Supr, 2008) (citation omitted). To prevent successive litigation of the issues, "a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not even been presentable in the class action." *Id.* (citation omitted). On the other hand,

> a release is overly broad if it releases claims based on a set of operative facts that will occur in the future. If the facts have not yet occurred, then they cannot possibly be the basis for the underlying action. . . . Additionally, a release may be overbroad if it could be interpreted to "encompass any claim that has some relationship—however remote or tangential—to any 'fact,' 'act,' or conduct 'referred to' in the Action." In other words, a release is overly broad if it releases claims based on a common set of tangential facts, as opposed to operative or core facts. [*Id.* (citations omitted).]

Given the relationship of the release to the "operative or core facts" comprising the current litigation, the stipulated release is not overly broad in its scope.

The trial court was satisfied with the extent of the discovery and investigation undertaken in granting approval of the final settlement. Despite the deficiencies asserted by the Objectors pertaining to the failure to depose Karmanos, plaintiffs obtained "approximately 39,000 pages of documents relating to the Transaction, including, among other things, board minutes and banker books, board presentations, management projections, financial analyses performed by Goldman Sachs, and emails from Defendants and Goldman Sachs." In addition, plaintiffs deposed Robert Paul (Compuware's former Chief Financial Officer), Jesse Cohn (Elliott Management's Senior Portfolio Manager and Head of United States Equity Activism), and Jason Rowe (Goldman Sachs' Managing Director of Technology, Media and Telecom Group). Aside from information pertaining to the arbitration involving Karmanos, which the parties assert was accessible and reviewed, the Objectors fail to identify any other information that was unavailable or not pursued to facilitate a determination regarding the value of the company or the fairness of the settlement. In such situations, the expectation would be that

> an objector seeking discovery [would] take a targeted, well-defined approach to specific discovery supported by a cogent argument as to why the specific information sought should have been known before a settlement was negotiated—that, in other words, such discovery is necessary in order to place any person who must competently recommend or assess the fairness of a proposed settlement in a position to do so. [*In re Amsted Indus, Inc Litigation*, 521 A2d 1104, 1110 (Del Ch, 1986).]

The Objectors contest the conclusion reached by plaintiffs and defendants based on the information available rather than the amount or type of information obtained. As such, the discovery conducted was sufficient to permit plaintiffs to examine the value of the company and to judge the fairness of the proposed settlement.

III. FAIRNESS, REASONABLENESS AND ADEQUACY OF SETTLEMENT

Finally, the Objectors assert that the trial court erred in finding the settlement agreement fair, reasonable and adequate as it failed to conduct an independent assessment of the costs and benefits given and received by all of the litigants. The Objectors contend that they were ready, willing and able to proceed with prosecution of their claims and would have obtained a financial recovery. Although acknowledging that the successful litigation of their claims was not guaranteed, the Objectors allege that the trial court's approval of the settlement constituted an abuse of discretion. Further, the Objectors insist, the subsequent dismissal of the claims by the Karmanos family members, having opted out of the settlement agreement, cannot be used ad hoc to justify the trial court's determination of reasonableness.

As explained in *Brinckerhoff v Texas Eastern Prod Pipeline Co, LLC*, 986 A2d 370, 384 (Del Ch, 2010) (citations and quotation marks omitted):

> The law, of course, favors the voluntary settlement of contested issues. The settlement of representative litigation, however, is unique because the fiduciary nature of the [litigation] requires the Court . . . to participate in the consummation of the settlement to the extent of determining its intrinsic fairness. The Court . . . plays a special role when asked to approve the settlement of a class or derivative action. It must balance the policy preference for settlement against the need to insure that the interests of the class have been fairly represented.
>
> When assessing fairness, [the court is] not required to make a definitive evaluation of the case on its merits. To do so would defeat the basic purpose of the settlement of litigation. [R]ather [it] must consider the nature of the claims, possible defenses, the legal and factual circumstances of the case, and then apply [its] own business judgment in deciding whether the settlement is reasonable. The Court must especially balance the value of all the claims being compromised against the value of the benefit to be conferred on the Class by the settlement.

According to Delaware law, when dealing with appeals arising from shareholder litigation settlement agreements:

> The Court of Chancery's special role is matched by our own limited one. Because the Court of Chancery's decision constitutes an exercise of discretion, we review the record simply to determine whether that discretion has been abused. We do not exercise our own business judgment in an effort to evaluate independently the intrinsic fairness of the settlement. Rather, if the findings and conclusions of the Court of Chancery "are supported by the record and are the product of an orderly and logical deductive process, they will be accepted" and the decision will be affirmed. [*Barkan v Amsted Indus, Inc*, 567 A2d 1279, 1284 (Del Supr, 1989) (citations omitted).]

Similarly, in Michigan:

> [T]he acceptance of a settlement in a class-action case is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. There is an overriding public interest in favor of settlements in class-action lawsuits. Factors to be considered by a trial court before approving a settlement include whether the settlement's terms are fair and reasonable, whether the settlement is a product of fraud, overreaching, or collusion, the relative strengths and weaknesses of the

> plaintiffs' claims, and the stage of the proceedings. Having considered a settlement offer in the context of other factors, the trial court does not necessarily abuse its discretion by accepting a settlement over the objections of the named representatives of a class. [*Brenner v Marathon Oil Co*, 222 Mich App 128, 133-134; 565 NW2d 1 (1997) (citations omitted).]

Ultimately, the Objectors' challenge to the trial court's approval of the settlement agreement reduces to an argument regarding the likelihood of the Objectors' success on their claims on the merits. This Court has previously recognized "the proposition that the nature and extent of the objections raised by a minority group of shareholders should be considered among other factors by the trial court in deciding whether to approve a proposed settlement that is acceptable to the majority of the class." *Brenner*, 222 Mich App at 135. However, when the trial court "reviews the fairness of a settlement, it must evaluate all of the circumstances of the settlement by using its own business judgment." *Barkan*, 567 A2d at 1284. The trial court is deemed to be "in the best position to evaluate the factors that support a settlement, [and this Court should] not second-guess its business judgment on appeal." *Id.* Rather, if there is evidence in the record to support the [court's] findings and if [its] conclusions are not the product of errors of law," the settlement approval should be affirmed. *Id.*

There are basically two components to the Objectors' assertions regarding the trial court's alleged error in approval of the settlement: (a) that damages could have been realized after litigation based on the breach of fiduciary duties of the company's board because of its collusion with Thoma Bravo and members of the board having succumbed to threats by Elliott, and (b) that the value of the company as an ongoing enterprise was greater than the price obtained for the shareholders.

Addressing the allegations of collusion and intimidation requires recognition of the results of discovery conducted in this matter and the presumptions afforded by the business judgment rule. Specifically, MCL 450.1541a provides, in relevant part:

> (1) A director or officer shall discharge his or her duties as a director or officer including his or her duties as a member of a committee in the following manner:
>
> (a) In good faith.
>
> (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.
>
> (c) In a manner he or she reasonably believes to be in the best interests of the corporation.
>
> (2) In discharging his or her duties, a director or officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by any of the following:
>
> (a) One or more directors, officers, or employees of the corporation, or of a business organization under joint control or common control, whom the director

> or officer reasonably believes to be reliable and competent in the matters presented.
>
> (b) Legal counsel, public accountants, engineers, or other persons as to matters the director or officer reasonably believes are within the person's professional or expert competence.
>
> (c) A committee of the board of which he or she is not a member if the director or officer reasonably believes the committee merits confidence.
>
> (3) A director or officer is not entitled to rely on the information set forth in subsection (2) if he or she has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) unwarranted.

Accordingly:

> "The business judgment rule is the 'presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company.' That presumption 'can be rebutted if the plaintiff shows that the directors breached their fiduciary duty of care or of loyalty or acted in bad faith.' The 'business judgment rule is [therefore] process oriented and informed by a deep respect for all good faith board decisions.' The rule requires substantial deference, and ultimately 'protects decisions unless they cannot be attributed to any rational business purpose.' " [*F5 Capital v Pappas*, 856 F3d 61, 87 (CA 2, 2017).]

Specifically, "plaintiffs must plead particularized facts sufficient to raise (1) a reason to doubt that the action was taken honestly and in good faith or (2) a reason to doubt that the board was adequately informed in making the decision." *In re JP Morgan Chase & Co Shareholder Litigation*, 906 A2d 808, 824 (Del Ch, 2005), aff'd 906 A2d 766 (Del Supr, 2006) (citations omitted).

The Objectors' claim that the board of directors, or certain members of the board, were unduly influenced by threats from Elliott or were in collusion to obtain preferential treatment has not been demonstrated to be true. Part of the supplemental disclosures obtained by plaintiffs dispelled these concerns, as all shareholders were treated in the same manner and received the same compensation. There was no demonstrable connection between any of the board members and Thoma Bravo. There was no evidence that any of the board members would receive a side deal or a separate benefit from the transaction, bolstered by the fact that none of the board members would retain their positions after the transaction or receive consulting or other deals of financial benefit.

Although the Objectors contend that Elliott obtained "dossiers" containing embarrassing or compromising information on the board members to coerce their votes, the Objectors merely speculate regarding the content of those files. In addition, the Objectors alleged that Elliott attempted to coerce only two or three of the board members, a substantial minority of the board. Finally, the Objectors' claim of intimidation was disspelled by the deposition of Fritz Henderson.

Henderson described what occurred when Jesse Cohn of Elliott met with Compuware's board. While Henderson believed that Elliott attempted to engage in intimidation, Henderson averred that Elliott was not successful. Despite queries and an opportunity to respond afforded by the trial court, the Objectors were unable to provide any further specificity with regard to their claims of collusion and intimidation.

In addition, the Objectors were unable to support their contention that the board members breached their duties in not obtaining a more lucrative settlement. There is nothing to suggest that the acquisition of Compuware by Thoma Bravo was other than an arm's length transaction. None of the board members were affiliated with Thoma Bravo or its subsidiaries. While other companies initially expressed interest, they dropped out of the bidding; only Thoma Bravo remained and submitted the highest bid. The board approved the transaction, but only following the receipt of advice from Goldman Sachs. Plaintiffs and the board received additional discovery and disclosures affirming that the settlement did not disproportionately benefit certain shareholders and that the various board members did not receive any form of side deals or preferential treatment.

The Objectors contend that the company's value was underestimated by Goldman Sachs because it was not valued based on the sum of its parts. This position does not take into consideration the revised figures relied on by Goldman Sachs following the company's receipt of lower than anticipated financial results and a commensurate reduction in the company's future financial projections. The trial court had available to it the competing analyses developed by the parties' respective experts and the agreed-upon share price fell within the share valuation range. Further, although the Objectors contend that the board neglected or failed to pursue more lucrative alternatives, such as a merger with another company that would have permitted the shareholders to retain an interest in the new entity, such an option was not a viable alternative given the withdrawal of the only entity considering a merger from the bidding process. At the end of the day, the only bidder standing and prepared to proceed with the acquisition was Thoma Bravo. Hence, because the Objectors failed to evidence bad faith, collusion or the breach of fiduciary duty by the board, any potential damages claim asserted by the Objectors lacks merit. A "claim for . . . damages against the directors for breach of duty can survive only if the Complaint alleges facts from which it reasonably can be inferred that (1) a majority of the Board was not both disinterested and independent or (2) that the [Board] did not act in good faith." *In re MeadWestvaco Stockholders Litigation*, 168 A3d 675, 683 (Del Ch, 2017) (citations omitted).

The trial court clearly undertook an independent analysis in approving the settlement. The court recognized its obligations and the standards to be applied, before engaging in a thorough analysis of the applicable factors in determining the propriety of approving the settlement agreement. Given the content of the pleadings, briefs and evidence provided, the court did not abuse its discretion in approving the settlement agreement, having found it to be fair, reasonable and adequate. As noted previously, "there is a presumption in favor of the settlement when there has been arm's length bargaining among the parties, sufficient discovery has taken place to enable class counsel to evaluate accurately the strengths and weaknesses of the plaintiff's case, only a few members of the class object and their relative interest is small."

C*rowhorn*, 836 A2d at 563. Even if the terms of a settlement agreement are not "ideal," approval should not be withheld if they are "fair and reasonable." *Jane Doe 30's Mother*, 64 A3d at 400.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Michael F. Gadola
/s/ Colleen A. O'Brien